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The UK's EU Referendum: Implications for Scotland's Constitutional Settlement

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Scotland's devolved powers have become progressively interconnected with both UK law and EU law, write Sarah Craig, Maria Fletcher and Nina Miller-Westoby. Focusing on the area of migration policy, they argue that, whatever the outcome of the EU referendum, the resulting legislative changes will have an impact on Scotland, which could raise constitutional questions if Scottish institutions are not sufficiently involved in the process.

One view of EU and UK law would suggest that the implications for Scotland of the UK leaving the EU are negligible, because they sit squarely within the implications affecting the UK as a whole. Distinctive Scottish implications would flow only if Scotland were an independent country.

However, this view is overly strict – the reality is more nuanced and messy. Within the terms of the devolution settlement – or perhaps, in spite of it – distinctive Scottish approaches to the EU and to immigration have emerged. As the devolution of powers to Scotland increases, so too does the intertwining of competences between Holyrood and Westminster. The outcome of the referendum ought to be considered in light of this messier reality.

The EU Referendum and Withdrawal: Legal Arrangements

An Act of the UK Parliament – the [European Union Referendum Act 2015](#) – makes provision for a referendum on the UK's EU membership. Legally, the UK government is not required to implement the result of the referendum. However it has [promised](#) the UK electorate that it will do so.

A decision to withdraw from the EU would take effect for the whole of the UK, even if a majority of the electorate in Scotland voted to remain. The EU Referendum Act does not provide for a 'double lock', where each constituent part of the UK would need to vote to leave in order for the UK to withdraw from the EU.

As a matter of EU law, a Member State's withdrawal from the EU is governed by Article 50 of the [Treaty on European Union](#) (TEU). It states that 'any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.'

In other words, the UK must come to that decision according to its own domestic laws and procedures. EU law makes no mention of ‘sub-state entities’ in the withdrawal process. Scotland cannot look then to EU law to argue for a greater or specific role to play in the process of EU withdrawal.

The process would entail negotiations between the UK and EU institutions and would likely take years rather than months. According to Article 50 TEU, these negotiations should take ‘account of the framework for its future relationship with the Union’, but it provides no procedure for that.

An agreement on the future relationship would probably be negotiated between the UK on the one hand, and the EU and its Member States on the other, in tandem with the withdrawal agreement. Indeed, this avenue was highlighted by a recent House of Lords EU Committee [Report](#) – although, as so often when the status of Scotland poses tricky political and legal questions, the report was silent on the role of devolved institutions in these processes.

Devolution Arrangements in the UK

The [Scotland Act 1998](#) (SA 1998) created the institutions, powers and administrative responsibilities that make up the devolution arrangements for Scotland within the UK. The main law-making powers of the Scottish Parliament are set out in Sections 28–30 of SA 1998.

Unlike the UK Parliament, the Scottish Parliament’s legislative powers are limited. Acts of the Scottish Parliament (ASPs) are competent only if they legislate upon devolved matters, are compatible with EU law and the European Convention of Human Rights and comply with the other limitations in [Section 29](#).

The SA 1998 does not specify devolved areas, but instead lists the powers reserved to Westminster ([Section 30](#) and [Schedule 5](#)). All remaining matters are then considered to be devolved matters.

Schedule 5, Part 2 Head B6 states that immigration and nationality, including asylum and the status and capacity of persons in the UK who are not British citizens; free movement of persons within the European Economic Area; and the issuance of travel documents are ‘reserved matters.’

In addition, ‘Foreign affairs’ (Schedule 5, Part 1 Para 7(1)) is a reserved matter, specifically including relations with the EU and its institutions. However, implementation of EU obligations is exercisable in devolved areas by Scottish Ministers under Section 53 of SA 1998.

Notwithstanding this allocation of powers, [Section 28\(7\)](#) of SA 1998 is noteworthy because it restates Westminster’s unlimited power to legislate in all areas – reserved and devolved. This illustrates why the Sewel Convention (which recognises that Westminster will not normally legislate on devolved matters without the consent of the Scottish Parliament) is an essential feature of the devolution settlement.

At face value, the legal provisions in relation to the EU referendum and withdrawal and the devolution settlement suggest that the distinctive Scottish implications of a UK exit from the EU are limited. However, the reality is more nuanced and complex than that.

Scotland and the EU – A Distinctive Relationship?

Scotland is [said](#) to be pro-EU and to be ‘firmly in the “Remain” camp’. This is certainly true of the official position of the Scottish Government. It has published a [case](#) for continued Scottish EU membership and the Scottish First Minister has claimed that the Scottish public is more pro-EU than the rest of the UK.

In fact, polls have [revealed](#) that Scottish public opinion is not that different from the rest of the UK on the transfer of power to the EU. Similarly, public attitudes to *migration* in Scotland, while [less negative](#) than south of the border (partly explained by the smaller [impact](#) migration has had on the Scottish labour market), are not significantly less negative.

However, there *is* a remarkable difference in Scottish public opinion on the EU referendum. An [analysis](#) of voter intention surveys suggests that, in Scotland, those wanting to remain in the EU substantially outnumber those who wish to leave the EU.

More Devolved Powers for Scotland, More Constitutional Questions?

Devolution of power to Scotland has not remained static since the 1998 settlement. The latest amendment, the [Scotland Act 2016](#) (SA 2016), is [said](#) to ‘transform the Parliament at Holyrood into one of the most powerful devolved parliaments in the world.’

This Act extends the competence of the Scottish Parliament substantially. For instance, it enables Scotland to set income tax rates and thresholds, gives it control over a significant part of the welfare system and puts the Sewel Convention on a statutory footing.

While SA 2016 does not change the fact that immigration and EU matters are reserved to Westminster, many of these newly devolved powers are intertwined with reserved ones. Implementing them will require very careful and detailed intergovernmental cooperation. Such cooperation through the Sewel Convention will in itself bring complexity, because its new statutory footing may affect how and by whom it is interpreted and, in turn, how it operates.

Scotland and Migration – Divergence and Tension within the Devolution Settlement?

The trend for immigration legislation to reach into areas of life beyond those traditionally associated with immigration control has intensified with the Immigration Acts of 2014 and 2016.

But this is nothing new. Under the provisions of a UK-wide statute, the [Immigration and Asylum Act 1999](#), the early years of devolution coincided with Glasgow becoming a major provider of housing for asylum seekers. The Dungavel Immigration Removal Centre also [opened](#) during that time.

This period also saw the emergence of Scotland's divergence in practice and policy, albeit in collaboration and agreement with Westminster. One example is the Scottish Government's response to asylum seekers and refugees on matters of integration, health, housing and education.

Another is the earlier Scottish Executive's agreement with the UK government on the 'Fresh Talent Initiative', which encouraged certain third-country national graduates to remain in Scotland. Alongside this, however, [institutional unease](#) in Scotland began to form about the reach of immigration legislation into devolved areas such as housing and social care – a feature that has intensified as that reach has also expanded.

Most recently, the provisions of the [Immigration Act 2016](#) that touch upon devolved matters – for instance, the landlord-tenant relationship – have highlighted the possibilities for constitutional uncertainty over the Sewel Convention's operation, prompting arguments [for](#) and [against](#) its reform. A UK exit from the EU might similarly raise challenging questions about the future operation of the Sewel Convention.

After a Vote to Leave the EU

As we have explored, neither EU law (Article 50 TEU) nor UK law (SA 1998) guarantees Scotland a specific role in negotiations leading to a withdrawal from the EU and post-exit agreements. Scotland will be able, at best, to feed into UK negotiations.

However, the extent to which that might happen, and the extent to which its position would be taken seriously, is dependent on agreement and goodwill between the UK government and the Scottish government – a situation where the former holds the balance of power.

The Concordat on the Coordination of EU Policy Issues [states](#) that Scottish Ministers and officials should be fully involved in discussions with the UK government on the formulation of the UK's policy on all issues which touch on matters falling within devolved responsibilities. However, this agreement does not have the force of law, nor does it commit the UK government to taking on board views expressed in the course of discussions.

Nevertheless, under its auspices, Scotland has experienced some degree of success in feeding into and shaping (and occasionally representing the UK line) on EU policy. While there may be grounds for hope that the UK government would want a cooperative relationship following a vote to leave – if only to avoid increasing support for the independence cause, and the likelihood of a second independence referendum – only time will tell.

This *indirect* route to influencing the EU is crucial, if too uncertain and *ad hoc* to command confidence. The Scottish Government has therefore worked to [develop direct](#) lines of communication and influence with EU institutions and bodies.

Building on this, it has been suggested that, if the UK exits the EU, Scotland (from within the UK) might wish to negotiate a distinct and [differentiated settlement](#) with the EU – one that reflected its more pro-EU, pro-immigration stance. However, we acknowledge that this would be politically and legally difficult, not least because the European Commission would probably wish to remain neutral on domestic constitutional issues.

More certain is that the the Scottish Government and the Scottish Parliament would be involved in the domestic disentanglement from EU law, a task that would be prompted by withdrawal from the EU.

As part of this effort – since EU laws that relate to devolved matters are implemented in Scotland by Scottish Ministers (SA 1998, Section 53) – there would be countless pieces of Scottish legislation to review, with a view to repealing, reforming or retaining them.

More significant would be the required amendments to SA 1998. This may raise the more complex question of the operation of the Sewel Convention. Amending SA 1998 would have the effect of altering the competences of the Scottish Parliament, and there is a strong [argument](#) that a Legislative Consent Motion (LCM) from the Scottish Parliament would be necessary.

Some commentators [argue](#) that the legal necessity of an LCM is not a foregone conclusion, particularly since the Sewel Convention has been put on a statutory footing. However, amending the competences of the Scottish Parliament without seeking an LCM would seem politically unthinkable, even without taking into account the possibility of the Scottish Parliament withholding consent. Such a scenario could result in constitutional uncertainty.

After a Vote to Remain in the EU

A vote to remain in the EU will not mean a continuation of the *status quo*. Rather, it would be followed by implementation of the '[renegotiation](#)' that David Cameron agreed with EU leaders in February 2016.

Prominent parts of that deal are aimed squarely at [restricting EU immigration](#) to the UK. This reflects what many lawyers view as a long-standing [tendency](#) on the part of UK governments to [incorrectly](#) implement EU free movement law, despite it being one of the cornerstone principles of the EU.

Just as the road ahead for Cameron's deal is not legally certain at the EU level (the European Parliament or the Court of Justice of the EU could block the implementation of certain parts), it might also prove challenging at home.

Here, tension could emerge between implementation of the renegotiation (which includes restrictions on in-work benefits for EU migrants for up to four years) and devolved social welfare powers under SA 2016.

Such tensions could be slow to emerge, since the devolved social welfare [powers](#) mostly affect older people and people with disabilities, rather than all workers or families more broadly.

If, in response to political pressure, the Scottish Parliament used its powers to top-up certain benefits for families and children, this could conflict with the UK government's approach of restricting EU citizens' access to social welfare. This could be exacerbated if Scottish policy on benefits were different from the rest of the UK, for instance by increasing benefits or including EU citizens. Only time will tell.

Looking Ahead: Scotland's Constitution

Complexity and uncertainty are the watchwords of the post-referendum legal landscape – particularly, but not exclusively, in the event of a vote to leave the EU. That said, whether the outcome is to remain in or leave the EU, legislative changes after the referendum will have an impact on Scotland.

In either scenario, the intertwined nature of the responsibilities held at different institutional levels in the UK could lead to strain on the constitutional settlement. This will be particularly the case if, in an era of greater devolution of power to Scotland, Scottish institutions are not involved in setting the post-referendum landscape.

This article draws from the authors' recent [position paper](#) for the Immigration Law Practitioners' Association.

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